

ORIGINAL

DOCKET FILE COPY ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

RECEIVED

JUN 20 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 ) CC Docket No. 92-115  
Revision of Part 22 )  
of the Commission's )  
Rules Governing the )  
Public Mobile Services )  
  
To: The Commission

---

COMMENTS OF PRONET, INC. IN RESPONSE TO  
FURTHER NOTICE OF PROPOSED RULEMAKING

---

ProNet, Inc. ("ProNet"), by its attorneys, hereby submits its initial comments in response to the Further Notice of Proposed Rulemaking ("FNPRM") in the above-referenced proceeding which proposes revising Part 22 of the Commission's Rules. The following comments center on proposals relating to the public land mobile services ("FNPRM, Section IV). ProNet respectfully urges the Commission to either reject or substantially modify the FNPRM proposals to:

- establish new filing windows for pending 931 MHz applications and for previously granted applications that are now subject to rehearing petitions;<sup>1/</sup> and
- consider as an initial application any request to construct and operate "a new facility more than two kilometers (1.6 miles) from any existing facility operating on the same frequency."<sup>2/</sup>

---

<sup>1/</sup> FNPRM at ¶¶ 15-17.

<sup>2/</sup> Id. at ¶18.

No. of Copies rec'd  
List ABCDE

074

As shown below, the foregoing proposals are inconsistent with the Communications Act of 1934, as amended (the "Act"), and offend fundamental notions of due process and administrative fairness; moreover, notwithstanding the assumptions motivating these proposals, they will prove ineffective, if not counterproductive, in attaining the Commission's objective of "expeditious licensing and provision of service." <sup>3/</sup>

I- STATEMENT OF INTEREST

Through its wholly-owned subsidiaries, Contact Communications, Inc. and Contact Communications of Massachusetts, Inc., ProNet provides high-quality paging on several wide-area 931 MHz common carrier networks in various mid-Atlantic and New England states.<sup>4/</sup> ProNet is also the proposed assignee of wide-area 931 MHz paging facilities presently licensed to Chicago Communications Service, Inc. in the greater Chicago metropolitan area.<sup>5/</sup> Based on these interests and on its substantial experience in constructing and operating wide-area paging networks, ProNet has a vital stake in the FNPRM's proposals for 931 MHz paging.

---

<sup>3/</sup> Id. at n. 34.

<sup>4/</sup> In addition, ProNet, either directly or through its subsidiaries, is a licensee in the Commission's Private Radio Service, holding Special Emergency, Business Radio and Private Carrier Paging authorizations.

<sup>5/</sup> See FCC File No. 25453-CD-AL-01-94.

II- ESTABLISHING NEW FILING WINDOWS FOR "PENDING" 931 MHZ APPLICATIONS IS INCONSISTENT WITH LAW AND PATENTLY UNFAIR

The FNPRM proposal sets forth new processing rules for 931 MHz applications and recommends applying these new rules "to both pending and future applications." A "pending" application is defined by the FNPRM to include not only those awaiting action by the Commission, but also those "that have been granted . . . and are the subject of petitions for reconsideration or applications for review."<sup>6/</sup>

All such "pending" applicants, as defined above, will have sixty (60) days from the effective date of the FNPRM-endorsed rules to specify (or re-specify) a 931 MHz frequency, after which acceptable applications will be placed on a public notice. New mutually exclusive applications can be filed during the thirty (30) days following release of this public notice. According to the FNPRM, all applications "MXed" by this process shall proceed to auction.<sup>7/</sup>

At least with respect to previously granted 931 MHz applications currently pending reconsideration or review, the FNPRM proposal squarely offends the Act. Section 405(b) states, in part, that:

A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or

---

<sup>6/</sup> FNPRM at ¶15.

<sup>7/</sup> Id. at ¶¶16-17.

operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. (Emphasis added.)

Thus, existing grants of 931 MHz authority that are pending rehearing are presently valid, effective and must be obeyed until such time as the Commission issues "the special order" indicating otherwise.<sup>8/</sup> The FNPRM seeks to write this statutory provision out of existence-- yet an agency's capacity to invalidate statutes cannot be seriously argued.<sup>9/</sup>

The FNPRM does concede, however timidly, that its proposed 931 MHz processing rules will be unfair. For 931 MHz incumbents who have constructed systems and are providing valuable service, notwithstanding the pendency of petitions for reconsideration of review, such unfairness will be especially acute. Unless these licensees prevail in the auctions envisioned by the FNPRM, their facilities, subscribers, good will, etc. will devolve-- most likely at fire sale discounts-- to the highest bidder for their

---

<sup>8/</sup> Section 1.106(n) of the Commission's Rules is virtually identical to the cited excerpt from Section 402(b) of the Act. An agency's duty to obey its own Rules is a settled principle of administrative law.

<sup>9/</sup> Even advocates of the FNPRM proposal should be reluctant to contend that an Order terminating this proceeding will constitute "the special order" required by Section 405(b). The culminating Order here will resolve myriad issues other than pending 931 MHz petitions for reconsideration and review while, assuming the FNPRM rule is adopted as proposed, simultaneously granting those petitions without any particularized findings of fact or conclusions of law. How such an Order could be construed as distinctive, unique, exceptional (i.e., "special") with respect to those pending petitions for reconsideration or review completely strains credulity.

authorizations.<sup>10/</sup> This kind of agency-induced economic distortion and windfall engenders suspicion and hostility toward Commission licensing processes and, in so doing, constricts participation in communication services requiring licensed facilities. As a result, development of these services is repressed.

Most inequitably, under the FNPRM's procedures, incumbent 931 MHz carriers will see their authorizations jeopardized solely due to the pendency of a petition which apparently has never been subject to agency scrutiny. Petitions that are strike filings, otherwise abusive, utterly meritless or procedurally defective will still impel involuntary divestiture of valid and effective 931 MHz authorizations. How this vindicates the public interest is never explained by the FNPRM.

To summarize, the new 931 MHz processing procedures recommended by the FNPRM should be scrapped, especially as applied to incumbent licensees subject to petitions for reconsideration or review. Agency resources should be focused instead on swiftly resolving these petitions in accordance with 931 MHz licensing procedures as initially established, applied and interpreted by the Commission. This course, not the FNPRM, is most consistent with expeditious deployment and availability of 931 MHz service.

---

<sup>10/</sup> Although the FNPRM alludes to the possibility of random selection rather than auction, that alternative may simply exacerbate a bad situation by encouraging speculators. The FNPRM proposal errs most fundamentally by establishing new filing opportunities, which will inevitably multiply the frequency and quantity of MX applications.

III- THE PROPOSED DEFINITIONS OF "INITIAL" AND "MODIFIED"  
931 MHZ APPLICATIONS WILL PREJUDICE WIDE-AREA NETWORKS

The definitions of "initial" and "proposed" 931 MHz applications proposed in the FNPRM<sup>11/</sup> should be rejected and reformulated because they:

- fail to distinguish between same frequency relocations on the perimeter as opposed to the interior of existing wide-area systems;
- discriminate against and will impede the growth of expanding local and regional systems; and
- confer a vast and inexplicable windfall on tower and site owners who can extort rent increases and other concessions from licensees arbitrarily confined by the FNPRM to their existing sites.

Perimeter versus Interior Relocations-- In contrast to UHF and VHF paging, comparable systems in the 900 MHz band require numerous transmitters to provide in-building penetration, continuous coverage and elimination of dead spots. In large urban environments, a typical system can require twenty to forty transmitters, while a regional network may require fifty to one hundred sites. Migration to higher speed/capacity transmitting equipment will require a roughly 50 per cent increase in the number of transmitting sites in a typical system just to maintain the existing coverage area.

Because of these trends, coverage maps for 931 MHz systems are characterized by numerous overlapping contours throughout the length and breadth of a system's geographic footprint. The FNPRM definitions appear oblivious to this axiom of 931 MHz system

---

<sup>11/</sup> FNPRM at ¶18.

design. Assuming arguendo that the two kilometer limit is acceptable, the failure to differentiate same frequency relocations in the interior of a network and those relocations occurring in a perimeter area is not.

Under the FNPRM definition, an application to change locations of an existing station licensed to the same licensee on the same frequency will be a "modification" application only if the new site is within two kilometers of the old. Thus, a relocation of more than two kilometers, even where restricted to the interior of a wide-area multi-transmitter system, could subject the licensee to competing applications, followed by competitive bidding.<sup>12/</sup> Why an elaborate, multi-transmitter 931 MHz network that may be serving thousands or tens of thousands users should incur such risk merely to reconfigure its system's interior is never explained by the FNPRM.

For the foregoing reasons, the FNPRM proposal must be revised to define all same frequency relocations and additions confined to the interior of a wide area system-- i.e., with no corresponding increase in the licensee's coverage footprint-- as modifications not initial applications.

Obstruction of Expanding Local and Regional Systems-- The proposed definitions of "modification" and "new" applications will substantially inhibit 931 MHz networks that are evolving to provide wide-area metropolitan and regional coverage. For many carriers,

---

<sup>12/</sup> The same risk is incurred where the licensee adds same frequency transmitters more than two kilometers from existing sites within the interior of its existing system.

this process is incremental-- cash flows from existing operations finance the investment required by system expansion. The proposed rule will obstruct that process; carriers poised for expansions entailing addition of transmitters more than two kilometers from existing sites will face the risks and vagaries of mutually exclusive applications, petitions to deny, and competitive bidding, rather than a clear expectation that they can extend their coverage footprint consistent with their financial capabilities, on the one hand, and the needs of the marketplace, on the other.

Equally important, the proposed definitions will create a sharp disparity between 931 MHz wide-area systems and competing private carrier systems operating on exclusive 929 MHz channels. Under recently implemented rules, 929 MHz licensees operating on exclusive frequencies have been immunized from competing, mutually exclusive applications when they:

- relocate or add transmitters more than two kilometers from existing sites in the interior of their systems;<sup>13/</sup> and
- relocate or add transmitters more than two kilometers from existing sites on the perimeter of their systems.<sup>14/</sup>

As already demonstrated, 931 MHz licensees will face the prospect of MX applications in both these situations if the definitional regime proposed by the FNPRM is implemented. As a consequence, a 929 MHz system will have considerably more

---

<sup>13/</sup> See Section 90.495(a) of the Commission's Rules.

<sup>14/</sup> See Section 90.495(f) of the Commission's Rules.



flexibility and regulatory freedom than its 931 MHz rival to expand facilities to accommodate changing demand conditions. The FNPRM provides no justification for bestowing 929 MHz carriers with this significant competitive advantage.

Windfall for Site Owners-- Intentionally or not, the proposed definitions will result in an economic windfall for site and tower owners and lessors who provide space to 931 MHz licensees. This windfall is unrelated to marketplace values or other economic realities, but is an inevitable consequence of the proposal's inherent rigidity and impracticality.

Parties leasing antenna space for 931 MHz facilities will, if the proposal is implemented, be able to demand exorbitant rent increases and other concessions from licensees. To avoid this extortion, the licensee must either acquire and license a substitute site within two kilometers of the subject site, or file a "new" application and pray that no MX ensues. Faced with these options, it is safe to predict that many licensees will accede to the landlord's demands, thus fostering a situation that is ripe for exploitation by owners and lessors.

IV- CONCLUSION

For the reasons set forth above, the Commission should: (a) reject the proposal to establish new filing windows for 931 MHz authorization subject to petitions for reconsideration and review; and (b) revise the proposed definitions for "new" and "modified" 931 MHz applications set forth in the FNPRM.

Respectfully submitted,

PRONET, INC.

By: 

Jerome K. Blask

Its Attorney

Gurman, Kurtis, Blask & Freedman,  
Chartered  
1400 Sixteenth Street, N.W.  
Suite 500  
Washington, D.C. 20036

(202) 328-8200

Dated: June 20, 1994